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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS MCGEE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1970 (R. 15).[1] A petition for rehearing

[1] "R." refers to the numbers appearing on the initial pages of the various documents making up the record. "Tr." refers to the trial transcript (record document numbered 9).

with a suggestion of rehearing *en banc* (R. 16) was denied on May 7, 1970 (R. 17-18). On June 1, 1970, Mr. Justice Harlan extended petitioner's time for filing a petition for a writ of certiorari until July 6, 1970, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's failure to exhaust his administrative remedies by appealing from the local board's denial of his request for conscientious objector status precluded him from challenging the validity of the denial at his trial for refusal to submit to induction.

2. Whether petitioner can raise for the first time at his trial that he was improperly denied a ministerial student classification, having never requested the classification or even advised the board that he was a ministerial student.

3. Whether petitioner's conviction for failing to submit requested information to his board is valid and whether the court of appeals in any event properly concluded that there was no need to consider this count in view of the concurrent sentence.

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Southern District of New York on all counts of a four-count indictment charging that he knowingly failed to submit to induction into the Armed Forces (count 1), report for a scheduled pre-induction physical exam-

ination (count 2), keep in his possession a valid notice of classification that had been sent him (count 3), and submit to his local board information that the board had requested (count 4), in violation of 50 U.S.C. App. 462(a) (R. 1; Tr. 299). On January 16, 1969, he was sentenced to two years' imprisonment on each count, the terms to run concurrently (R. 8). The court of appeals affirmed, one judge dissenting (Pet. App.).

Petitioner registered with his local Selective Service board in New York City in August 1961 and informed the board a month later that he was a student preparing for the ministry at Cathedral College of St. Joseph's Seminary, under the direction of the Roman Catholic Church. He took a leave of absence from the Cathedral College in 1963 and in September of that year he was classified I-A. In August 1964, he took and passed a pre-induction physical examination. Shortly thereafter he enrolled at the University of Rochester and was granted a II-S (student) deferment, which he retained until September 1967, except for a brief period in 1965 not here pertinent (Pet. App. 2a; R. 3, Exs. A and B).

In February 1966, petitioner wrote to his local board that he wished to declare himself a conscientious objector to war. The board sent him an SSS Form 150 (Special Form for Conscientious Objector) which petitioner completed and returned. In response to one of the questions in the form, he stated that, although he had left an official minor seminary of the Catholic Church, it was his intention, ultimately, to continue on to "actual ordained priesthood." In an attachment

to the form he added that he was conscientiously opposed not only to combatant and noncombatant military service, but also to "obligatory compensatory service in civilian work," and that he claimed exemption from such civilian service as well. On March 23, 1966, the board advised petitioner that the evidence he submitted had been reviewed and it was the decision of the board that the evidence did not justify a reopening of his case and reconsideration of his present (II-S) classification; however, he was told that his claim to CO status would be considered when he no longer qualified for a student deferment. Petitioner took no further action in the matter. In October 1966, he requested and was granted renewal of his II-S classification (Pet. App. 2a-3a; R. 3, Exs. C, D, E).

On April 15, 1967, while still classified II-S, petitioner wrote a letter to President Johnson, enclosing remnants of his torn and burnt registration certificate (SSS Form 2). He stated in the letter that although he had been "accepted for graduate study in a program where [he] would probably qualify for the theological deferment" he felt it necessary to "sever every link with violence and war" and to refuse to cooperate "with the military-industrial complex which seems to be dictating our international policy." Petitioner's local board received a copy of this letter, apparently considered reopening his classification but decided against it, and in any event did not change his II-S classification (Pet. App. 3a; R. 3, Exs. B, G).

In June 1967, petitioner graduated from the University of Rochester and the following month the

board sent him a Current Information Questionnaire (SSS Form 127) to fill out and submit. Petitioner returned the questionnaire unanswered and in an accompanying letter, dated July 23, 1967, advised the board that further correspondence from it would be returned unopened, "consistent with my belief that cooperation is approval of actions and policy which in conscience I can have nothing to do with." On September 19, 1967, petitioner was reclassified I-A. The following day the board mailed him a notice of this classification (SSS Form 110) and enclosed a letter informing petitioner that he had a right to request a personal appearance or to take an appeal within 30 days, that the board had a government appeal agent available to aid him with such appearance, appeal, or other procedural right, and that the appeal agent, or his representative, would give petitioner legal counsel on Selective Service matters at no charge. Petitioner returned the communication unopened, writing on the envelope: "Returned pursuant to previous declaration and notification" (Pet. App. 3a-4a; R. 3, Exs. B, J).

Petitioner also returned unopened an order directing him to report for a pre-induction examination on October 18, 1967; he did not report. On November 21, 1967, he was declared delinquent for that failure and a delinquency notice was sent him the following day. This too was returned unopened. On January 11, 1968, he was ordered to report for induction on January 29. On the scheduled date he reported for but refused to submit to induction (Pet. App. 4a; R. 3, Ex. B).

Meanwhile, on September 27, 1967, petitioner had matriculated at Union Theological Seminary, a non-denominational institution to which he had been recommended by his parish priest. However, he at no time requested a IV-D (ministerial student) classification from his local board, nor did he ever advise the board that he was attending the institution (Pet. App. 4a).

The chairman of petitioner's local board testified at a hearing held outside the presence of the jury that when petitioner's request for conscientious objector status was submitted to the board in February 1966, it was denied because petitioner, being then a student, was entitled to a II-S deferment (a lower classification than I-O) (Tr. 145, 156-161); that when petitioner, following his graduation from college, was reclassified I-A on September 19, 1967, the entire board participated in the decision (Tr. 162, 165, 171-175, 182); and that the board on that occasion reviewed all the pertinent information in his file (Tr. 175, 182). The trial judge found as a fact that in classifying petitioner I-A the board considered his request for CO status (Tr. 301).

ARGUMENT

1. Petitioner's failure to exhaust his administrative remedies by appealing from the local board's denial of his request for conscientious objector status precluded, contrary to his principal contention in this Court (Pet. 12-19), a subsequent challenge at his trial to the validity of the board's classification. *McKart* v. *United States*, 395 U.S. 185, did not abro-

gate generally the long established rule that except in rare cases involving most unusual circumstances[2] a registrant's disregard of administrative appellate processes prevents him from challenging his classification in the courts.[3] In that case the Court relaxed the principle in situations where the question on which classification depends—*i.e.* the meaning of the "sole surviving son" exemption of 50 U.S.C. App. 456(o)—is "solely one of statutory interpretation" (395 U.S. at 197-198). It carefully noted, however, that the holding did "not apply to every registrant who fails to take advantage of the administrative remedies provided by the Selective Service System" (395 U.S. at 200). Indeed, the Court specifically excepted from the *McKart* decision the failure of a registrant to pursue an appeal where the assessment of his claim to exemption or deferment status requires "expertise or the exercise of discretion, both by the local boards and the appeal boards" (395 U.S. at 198, 200). Significantly, the Court expressly mentioned conscien-

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[2] Cf. *Donato* v. *United States*, 302 F. 2d 468, 470 (C.A. 9) (appeal not taken due to circumstances beyond registrant's control).

[3] See, *e.g.*, among the more recent decisions, *Edwards* v. *United States*, 395 F. 2d 453, 454 (C.A. 9), certiorari denied, 393 U.S. 845; *Kidd* v. *United States*, 386 F.2d 422, 423 (C.A. 10); *United States* v. *Kurki*, 384 F. 2d 905, 907 (C.A. 7), certiorari denied, 390 U.S. 926; *Dunn* v. *United States*, 383 F. 2d 357 (C.A. 1), certiorari denied, 390 U.S. 982; *Noland* v. *United States*, 380 F. 2d 1016, 1017 (C.A. 10), certiorari denied, 389 U.S. 945. Cf. *Cox* v. *United States*, 332 U.S. 442, 445, 448; *Sunal* v. *Large*, 332 U.S. 174, 176; *Gibson* v. *United States*, 329 U.S. 338, 349-350; *Estep* v. *United States*, 327 U.S. 114, 123; *Billings* v. *Truesdell*, 321 U.S. 542, 558; *Falbo* v. *United States*, 320 U.S. 549.

tious objector claims as examples of the kind of claims to which the decision generally did not apply (395 U.S. at 198 n. 16, 201).

Thus, irrespective of whether petitioner's local board passed on the merits of his conscientious objector claim when it reclassified him I-A in September 1967 (the sole issue on which the court below was divided[4]), petitioner's failure to pursue his appellate remedies precluded him from contesting the validity of his classification at his trial. For Selective Service appeal boards, as the court below noted (Pet. App. 15a), do not perform simply a reviewing function. Like local boards, they classify *de novo*. *DeRemer* v. *United States*, 340 F.2d 712, 719 (C.A. 8). This alone is a sufficient response to the dissenting judge's concern below that in a "close" case the balance might be "tipped either way" at the appellate stage "by a desire not to set aside the action of" the local board (Pet. App. 24a). The essential point of *de novo* consideration is that the reviewing body makes a fresh appraisal of the registrant's claim without regard to whether its decision accords with the original action taken by the local board. Petitioner's deliberate bypassing of the appeal procedure afforded him under the regulations denied the Selective Service System an opportunity fully to reexamine his file to determine if any error may have occurred; he thus fore-

[4] As appears from the opinions below, the chairman's testimony was somewhat ambiguous on this issue. As the majority noted (Pet. App. 15a), the trial judge, who saw and heard the witness, found as a fact that the board considered the request for C.O. status when it reclassified petitioner in 1967 (Tr. 301).

closed himself from challenging his classification in a subsequent criminal prosecution. Cf. *Lockhart* v. *United States*, 420 F.2d 1143 (C.A. 9) (*en banc*), decided after *McKart*, where even the dissenting judges recognized the appropriateness of applying the exhaustion doctrine in situations where the registrant "has deliberately sought to subvert and evade the administrative process" and his default was not "merely inadvertent or negligent" (420 F.2d at 1155).

United States v. *Davis*, 413 F.2d 148 (C.A. 4), relied on by petitioner (Pet. 13-14, 19), does not conflict with the decision below. There the local board did not comply with its duty to advise the registrant of the availability of a government appeal agent to apprise him of his rights, including the right of appeal (413 F.2d 149-150). Accordingly, the court held that *Davis* came within the rule that "special circumstances may excuse the registrant from the ordinary consequences of his failure to administratively appeal" (*id.* at 151; see *supra*, pp. 6-7). Here the notice found wanting in *Davis* was contained in the communication which the local board sent to petitioner when he was reclassified I-A and which petitioner returned to the board unopened (*supra*, p. 5). *Davis*, thus, as the court below noted, cannot avail petitioner, "who had advised the local board in no uncertain terms that he would not read anything they sent him, and would not have appealed no matter what he was told" (Pet. App. 18a).[5]

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[5] Petitioner's reliance on *McNeil* v. *United States*, 395 U.S. 463 (remanding *United States* v. *McNeil*, 401 F. 2d 527 (C.A. 4), to the United States District Court for the Eastern Dis-

2. Petitioner's contention that he was erroneously denied a IV-D (ministerial student) classification on the basis of his matriculation at Union Theological Seminary in September 1967, a few months before he was ordered to report for induction (Pet. 19-26), is without merit. This argument is fully answered in the majority's opinion of the court of appeals on which we rely here (Pet. App. 5a-10a).[6] We stress only that petitioner not only never requested the exemption he now says was improperly denied him, but, indeed, he never even advised the board that he was attending the institution in question, a matter of importance because of the factual issues as to whether

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trict of Virginia for further consideration in light of *McKart*), is also misplaced. While that case involved the denial of a conscientious objector claim—*i.e.*, one of the kinds of claim which the Court declared was generally not to be governed by *McKart*—we point out that *McKart* did not indicate that the failure by a CO claimant to exhaust his administrative remedies could *never* be excused. Instead, it merely noted that different considerations were applicable to such claims and left to future cases further delineation of the governing principles. It was natural, therefore, since *McNeil* was pending before this Court when *McKart* was decided, to remand the case for reconsideration in light of the pertinent discussion in *McKart*. Moreover, in its memorandum to this Court in *McNeil*, the government had pointed out that, contrary to the court of appeals' assumption in that case, it was possible that the registrant had adequately noted his wish to appeal, so that disposition of the case under the failure-to-exhaust-remedies rationale might in any event have been inappropriate (Memorandum for the United States, No. 1048 Misc., October Term, 1968 pp. 5-6). The government, therefore, itself suggested the necessity of remand.

[6] The dissent below did not disagree with the majority on this issue.

petitioner's studies were under the requisite religious auspices. Cf. *McKart* v. *United States*, *supra*, 395 U.S. at 198 n. 15; *Dickinson* v. *United States*, 346 U.S. 389, 395.[7]

3. Petitioner's challenge to his conviction on count 4—for failing to submit requested information to his local board (in the Current Information Questionnaire mailed him in July 1967) (Pet. 27-29)—is also untenable. He argues that any information he might have supplied would have been beneficial rather than detrimental to him from the standpoint of his liability to induction (Pet. 28-29). But, even if so, the fact is irrelevant. The regulation imposing the duty which petitioner violated is categorical in its terms and does not make compliance conditional on the character of the information withheld (32 C.F.R. 1641.7(b)). Petitioner contends that it was error for the court to instruct the jury that it could find the

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[7] Petitioner's contentions with respect to his convictions on counts 2 and 3—for failing to report for his ordered physical examination and for failing to possess a valid classification notice (Pet. 26-27)—presuppose the invalidity of his I-A classification. Since his challenges to that classification are untenable for the reasons we have stated, there is no occasion to consider the contentions respecting these counts. See, moreover, as to count 2, this Court's observation in *McKart* v. *United States*, *supra*, 395 U.S. at 203, that "[a]n invalid classification * * * would not be a defense today to a prosecution for failure to report for a pre-induction examination." In any event, petitioner's sentences on counts 2 and 3 run concurrently with his sentence on count 1 (refusal to submit to induction), and, therefore, for this additional and independent reason, there is no warrant for further review of the convictions on those counts. Cf. *Benton* v. *Maryland*, 395 U.S. 784, 791; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

requisite intent under this count merely by determining that he knowingly failed to return the questionnaire; he asserts that the jury should have been instructed that it must determine whether the information sought by the board was in fact already in its possession (Pet. 27-28). While we believe that there is no merit to this argument, it is enough for present purposes to point out that petitioner failed to object to the criticized instruction when it was given or to request the instruction which he now says should have been given (Tr. 245-247, 293-296). He is consequently foreclosed from raising the points here. Rule 30, F. R. Crim. P. Since, at all events, petitioner's sentence on this count, like his sentences on counts 2 and 3 (see fn. 7, *supra*), were ordered to run concurrently with his sentence on the principal count, the court of appeals, in its discretion, could properly conclude (Pet. App. 18a) that as a matter of judicial convenience there was no need to consider the count 4 conviction. Cf. *Benton* v. *Maryland*, 395 U.S. 784, 791; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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